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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1436

EDWARD WHITE and ALFRED BLUMBERG,
Petitioners,

—against—

SECURITIES & EXCHANGE COMMISSION,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners Edward White and Alfred Blumberg pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on February 24, 1975. (Appendix A, *infra*, p. 2a).

Opinions Below

In a judgment, entered in this case on March 8, 1974, and containing findings of fact and conclusions of law, the United States District Court for the Southern District of New York, Weinfeld, *J.*, granted permanent injunctive relief against the defendants with respect to the sale of North American Research and Development Corp. securi-

ties or any other securities. (Appendix C, *infra*, pp. 8a-31a). The text of the Court's opinion is contained in the judgment and is reported at 345 F. Supp. 465 (1974).

The United States Court of Appeals for the Second Circuit, in an opinion not yet reported, affirmed the above judgment of the District Court (Appendix A, *infra*, p. 2a).

Jurisdiction

The opinion of the United States Court of Appeals for the Second Circuit, here sought to be reviewed, is dated February 24, 1975. (Appendix A, *infra*, p. 1a). This petition for certiorari is timely filed under the provisions of 28 U.S.C. § 2101(c) and Rule 34(1) of this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

WERE THE PETITIONERS DENIED THEIR RIGHT TO A PLENARY TRIAL AND THUS DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT, WHEN, AFTER THEY HAD MOVED UNDER RULE 65(a)(2) OF THE RULES OF CIVIL PROCEDURE, FOR A CONSOLIDATED HEARING AND TRIAL, AND THE MOTION HAD BEEN DENIED, THEY WERE REQUIRED, ALMOST SIX YEARS AFTER THE HEARING, TO SUBMIT TO A RULE 65 "TRIAL" WHICH CONSISTED OF A READING OF THE RECORD OF THE PRELIMINARY HEARING BY THE DISTRICT JUDGE IN CHAMBERS, AND WHICH RESULTED IN A FINAL JUDGMENT BASED ON THAT RECORD?

Constitutional Provision and Regulatory Provision Involved

The United States Constitution

Fifth Amendment

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Federal Rules of Civil Procedure

Rule 65(a)(2)

Consolidation of Hearing With Trial on Merits

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

Statement of the Case

On September 26, 1967, the Securities and Exchange Commission (Commission) filed a complaint and issued summonses against 43 defendants, seeking to enjoin the defendants from violations of the Securities Act of 1933 (15 U.S.C.A., § 77(b)) and the Securities Exchange Act of 1934 (15 U.S.C.A., § 78(u)(e)). There were some defaults and some consents to the entry of preliminary injunctions, and, finally, the Commission made a motion for a preliminary injunction against 21 remaining defendants, among them Edward White, North American Research and Development Corporation and Alfred Blumberg.

On November 15, 1967, White's then lawyers made a motion, under Rule 65(a)(2), to consolidate the hearing with a trial (J.A. 42a-45a).* On November 15, 1967, Judge Sylvester Ryan denied the motion in a handwritten but unsigned order (J.A. 41(a)).

On January 3, 1968, a hearing on the Commission's motion for a preliminary injunction began before Judge Mansfield. On January 17, 1968, the hearing was concluded and Judge Mansfield reserved decision.

During the hearing, White's lawyers, relying on Judge Ryan's denial of the Rule 65(a)(2) consolidation, assumed that a trial for a final injunction would take place later. And, since they knew that the only requirement for the granting of a preliminary injunction was the establishment of a prima facie case, and since they assumed that the Commission would be able to do this, they felt no obligation to present their full, or their best, case.

On February 8, 1968, Judge Mansfield filed an opinion temporarily enjoining the defendants White and North American but denying injunctions against several others, including Blumberg. (280 F. Supp. 106). On February 28, 1968, the Commission filed a cross-appeal.

On May 18, 1970, the Court of Appeals for the Second Circuit affirmed as against White and North American and reversed and remanded as against the seven defendants in whose favor Judge Mansfield had decided including Blumberg (424 F.2d 63). After a hearing on the remand, the other seven defendants were also preliminarily enjoined.

The Commission did not, however, move the case for trial.

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* These references to J.A. are to the Joint Appendix in the Court of Appeals.

On February 29, 1972, the Commission made a motion for summary judgment against the only remaining defendants, White, North American and Blumberg.

On July 18, 1972, Judge Motley denied the motion as against White and Blumberg and granted it against North American for reasons which are not here pertinent. (59 F.R.D. 111)

The Commission then moved the case for trial and stated to Hon. Edward Weinfeld, the Judge to whom the case had been assigned, that they proposed to proceed under Rule 65(a)(2).

On April 26, 1973, White and Blumberg made a motion before Judge Weinfeld for a de novo trial, stating that the defendants would be denied their Constitutional right to their day in Court, if the trial were to consist of a reading of the minutes of the hearing, which then seemed likely to happen.

This point was also argued to Judge Weinfeld on several other occasions, without formal motions.

On May 2, 1973, Judge Weinfeld denied the motion.

On June 27, 1973, the trial took place. The Commission produced no witnesses, but, fortuitously the defendants White and Blumberg were in Court and the attorney for the Commission called them as his witnesses.

On March 8, 1974, Judge Weinfeld filed an opinion granting a final injunction. (375 F. Supp. 465 (1974)).

On May 23, 1974, the defendants White and Blumberg filed notices of appeal.

On February 24, 1975, the Court of Appeals for the Second Circuit affirmed in a Per Curiam opinion (not yet reported).

REASONS FOR GRANTING THE WRIT

The Petitioners Were Denied Their Right To A Plenary Trial And Thus Deprived Of Property Without Due Process Of Law, In Violation Of The Fifth Amendment, When, After They Had Moved Under Rule 65 (a)(2) Of The Rules Of Civil Procedure, For A Consolidated Hearing And Trial, And The Motion Had Been Denied, They Were Required, Almost Six Years After The Hearing, To Submit To A Rule 65 "Trial", Which Consisted Of A Reading Of The Record Of The Preliminary Hearing By The District Judge In Chambers, And Which Resulted In A Final Judgment Based On That Record.

ARGUMENT

This is a matter of first impression. The problem presented here has never reached this Court, nor any of the Circuit Courts. The problem originates with the 1966 amendment to Rule 65 of the Rules of Civil Procedure, which permitted the consolidation, in an injunction proceeding, of the preliminary hearing and the trial of the action on the merits, and permitted the use of the preliminary hearing testimony upon the trial.

The question is whether, when a consolidation has been requested by the defendants and denied, and there is a six-year lapse between the preliminary hearing and the trial, with different Judges in each proceeding, due process does not mandate a plenary hearing in a de novo trial on the merits. We respectfully urge that it does, and that its denial in this case requires review, and correction, by this Court.

a. The testimony at the hearing—despite the denial of the consolidation—in fact turned out to be the basis for the final injunction, since there was no new testimony at the trial which related to the subject matter of the injunction. And, since there was no notice at the hearing that a final injunction was being litigated, no final injunction could be granted. Due process mandated a *de novo* plenary trial.

The manifest purpose of Rule 65(a)(2) is the efficiency resulting from a consolidation of two judicial proceedings into one. When, therefore, consolidation is ordered, the Judge will treat the hearing as a trial, will exclude hearsay and other inadmissible evidence, and will reach a *final*, not a temporary, conclusion.

The Notes of the Advisory Committee state that the amendment will be useful because consolidation will result in retaining the evidence at the hearing "in such form as to qualify for admission on the trial proper", and that it "will tend to expedite the final disposition of the action".

When consolidation is not ordered, or, as in this case, denied, the Judge only needs to find a prima facie case in order to grant *temporary*, not final, relief.

This is a huge difference.

Judge Frank, describing the nature of a preliminary hearing in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 742, (2d Ct. 1953) said:

> "The judge's legal conclusions, like his fact-findings, are subject to change after a full hearing, and the opportunity for more mature deliberation. For a preliminary injunction—as indicated by the numerous more or less synonymous adjectives used to label it—is, by its very nature, interlocutory,

> tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness".

It is clear, therefore, that when a hearing is only a hearing, the Judge has a tendency to be more flexible and more lax in admitting evidence. Indeed, a temporary injunction can be granted on affidavits alone—and without any testimony at all. But a final injunction requires "a full reconsideration after a plenary hearing" (*Sutton Cosmetics (P.R.)* v. *Lander Co.*, 455 F.2d 285 (2d Ct. 1972).

Fundamental to the fairness of the proceeding is, of course, that notice be given at a meaningful time so that the parties are alerted to the fact that either there will be a trial at a later date, or that this is their final day in Court. It is supererogatory to point out that the preparation of the parties and their lawyers will be profoundly different in one case from the other.

This hearing, of course, could have been consolidated with the trial. Indeed, White's lawyer requested a consolidation by a written notice in advance of the hearing (J.A. p. 42(a)-45(a)). We do not know why Judge Ryan denied the motion, but he did (J.A. p. 41(a)). And no one at the hearing made the request. The lawyers—certainly White's lawyer—had every reason to believe, therefore, that since there was not going to be a consolidation, and since the only thing the Committee would have to do would be to make out a prima facie case—which it was expected to be able to do—they could hold their fire for a real defense until the trial on the merits.

And the only thing that was proved *was* a prima facie case, as Judge Mansfield clearly noted in his opinion (280 F. Supp. 106 (S.D.N.Y. 1968)).

That the defendants' position at the hearing was a reasonable position has been held by the Second Circuit Court of Appeals in *Capital City Gas Co.* v. *Phillips Petroleum Co.*, 373 F.2d 128 (1967). There the Court, vacating a permanent injunction, said:

> "Of course the judgment order cannot be permitted to remain in force as a permanent injunction; Phillips has a clear right to have a full hearing on the merits of the complaint, for the order was granted upon a hearing noticed for a temporary injunction only, and no warning was given to the parties that a permanent disposition of the case was likely."

The Court went on to distinguish between a preliminary hearing and a trial, saying:

> "The noticed hearing upon temporary relief was never consolidated with a trial on the merits for permanent relief although the Court considered evidence put in by both parties. As pointed out above, the parties were not made aware that final relief was to be granted. Because of the different scope of possible relief, the difference in types of evidence admissible, and the difference in burden of proof required, compare Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 728, 740 (2nd Cir., 1953) with Allen v. Pyrene Mfg. Co., 111 F. Supp. 819 (D.N.J., 1953), between permanent and temporary injunctive relief, a party is entitled to notice that permanent rather than temporary relief is being determined. Since Phillips was not given such notice in this case, the permanent injunction must be vacated."

The Court of Appeals in the Seventh Circuit has taken the same position, in *Pughsley* v. *3750 Lake Shore Drive Cooperative Building*, 463 F.2d 1055 (7th Ct., 1972):

> "If a consolidation of a trial on the merits with a hearing on a motion for preliminary injunction is to be ordered, the parties should normally receive clear and unambiguous notice to that effect either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases.
>
> * * * * *
>
> Different standards of proof and of preparation may apply to the emergency hearing as opposed to the full trial."

The Court of Appeals in the Fourth Circuit has also taken the same position, in *Nationwide Amusements, Inc.* v. *Nattin*, 452 F. 2d 651 (4th Ct., 1971).

> "We realize that a number of witnesses appeared for appellant, that the case was developed in some detail, and that the issues presented by the motion for preliminary injunction were similar if not the same as those raised for final determination. Nevertheless, we are concerned that appellant may have been denied his full day in court. . . ."

So, also has the Fifth Circuit, saying in *Eli Lilli & Co.* v. *Generix Drug Sales Co.*, 460 F.2d 1096, 1106 (1972):

> ". . . (W)hile this circuit does not interpret Rule 65(a)(2) to require a formal written "order", it does require some form of notice to the parties that their final day in court has come".

See also, *T.M.T. Trailer Ferry* v. *Union De Tronquistas*, 453 F.2d 1171 (1st Ct. 1971).

Moore makes the same point about the necessity of the "day in court":

> "What is required is that the parties be given a full opportunity to present evidence in the case. At a hearing on application for a temporary injunction it is not necessary to establish to a certainty that the plaintiff is entitled to relief on the merits, but rather that his success is probable. A plaintiff putting on his case for temporary relief may hold back evidence, or, indeed, his case may not be fully developed. Thus it is important for him to know that when he puts on his evidence he is having his final "day in court." 7 Moore's Federal Practice, § 65.04(4)

That this is plainly the law cannot be challenged, and if Judge Mansfield had granted a permanent injunction based on the testimony at the hearing, it would have been beyond his power and clearly reversible error.

When Judge Weinfeld granted a permanent injunction almost six years later—on the same testimony, except for a trivial addendum, which we will discuss later—it was just as much beyond his power and just as clearly reversible error.

Judge Weinfeld brushed aside the petitioners' claim of lack of notice and their fundamental right to a plenary trial on the merits by remarking, in a footnote (Appendix C *infra*, p. 13(a)) that "The defense at this trial was, of course, free to call any witnesses or offer any additional evidence, but failed to do so". The Court of Appeals agreed, also in a footnote, saying "Appellants have now had their trial before Judge Weinfeld. It is no denial of due process if they chose not to present any evidence there" (Appendix A *infra*, p. (4a)).

These comments, considering the six year delay, are startling. Is this what due process means? Suppose, instead of 6 years, the delay had been 16 years, or, indeed, 26 years. Would this attempted resuscitation of dead evidence still have given the petitioners the day in court to which they were entitled?

The unconscionable six year delay is what makes this a due process problem. There is no case in the books remotely resembling this one. How do you prepare for such a trial? How do you get witnesses six years after the event? How do you find the old witnesses to recall for further cross-examination? It is not notice, in a Constitutional sense, to be told by a trial Judge, more than five years after a hearing, in denying your motion for a de novo trial, "I am going to try this case under Rule 65(a)(2). I am going to use the testimony at the hearing. Prepare yourselves for such a trial". If the defendants White and Blumberg had not been in court and been put on the stand by the Commission's counsel, we would have stood mute, and the trial would have amounted to the Judge reading the hearing transcript in his chambers. Is this a trial?

If this had been a criminal case, the delay here would have been a violation of the Sixth Amendment. We suggest that a permanent injunction, in a case like this, granted for reasons which smack of fraud, destroys the reputation of the person against whom it is granted and renders him incompetent to pursue his normal vocation, in this case, dealing in securities, and is the equivalent of a criminal conviction, and that before such a sanction is decreed, a defendant is entitled to the same protection as if the case had been a criminal case.

b. Because of a six-year lapse of time between the preliminary hearing and the trial, and because the Judges were different, the petitioners were entitled to have the testimony repeated and read into the record.

At the remand hearing before Judge Mansfield, the following colloquy took place:

> The Court (Judge Mansfield): Now, let me ask you this, Mr. Deitz (the Commission's counsel). You said something about wanting permanent relief as distinguished from preliminary relief.
>
> Mr. Deitz: Well, we intend to press the case to a judgment on permanent injunction.
>
> The Court: Is there any further evidence that you wish to offer?
>
> Mr. Deitz: As concerns the preliminary relief?
>
> The Court: Permanent relief.
>
> Mr. Deitz: Yes, your Honor.
>
> The Court: There is?
>
> Mr. Deitz: Yes, there will be.
>
> The Court: When do you want to offer it?
>
> Mr. Deitz: We expect that there will be probably a somewhat more protracted trial at some later time. We are not prepared now to offer that evidence. We have submitted what we feel to be a complete case for the granting of preliminary relief.
>
> • • • • •
>
> The Court: What have you got that's new? Is it a wholly new case?
>
> Mr. Deitz: No, your Honor, but there is certain evidence, certain facts, which were submitted to your Honor and which might not be acceptable under the rules of evidence which apply in a trial for permanent injunction. . . .

From all of this it follows that the Commission realized that inadmissible evidence had been received and that they had not proved a sufficient case for a permanent injunction. Moreover, they were under a duty to bring the case on for an immediate trial. Indeed, justice required it. See *Wright & Miller, Federal Practice and Procedure, Civil* § 2950:

> "If a Rule 65(a) injunction is granted, a speedy trial minimizes the potential adverse effect of what may prove to be an unjustified restraint on defendant. . . .
>
> * * * * *
>
> . . . . The urgency that is characteristic of cases involving preliminary injunction applications makes a rapid determination on the merits especially important."

But the Commission waited for more than two years after the Court of Appeals' affirmance and did not move the case for trial. And then, because they had in fact no "further evidence . . . . to offer . . . . which would be acceptable under the rules of evidence which apply in a trial for permanent injunction" (Deitz) and they were afraid that they could not succeed on a trial, they decided to circumvent this risk by moving for summary judgment. But Judge Motley denied the motion as against White and Blumberg and in denying the motion also considered the "day in court" concept, saying that there was a "due process requirement that the parties should not be foreclosed on the merits by a hearing that expressly addressed only preliminary questions, and at which parties may not have presented their best possible case. Here defendants were rightfully entitled to expect that they would have a further day in court." (59 F.R.D. at 114).

Dented, but undaunted, by Judge Motley's denial of summary judgment, the Commission now was compelled to move the case for trial. But, still afraid of a plenary trial, they moved the case for "trial" under Rule 65(a)(2) stating that they intended to go forward on the basis of the testimony of the preliminary hearing.

By this time, more than five years had elapsed since the preliminary hearing, and the case had been assigned to Judge Weinfeld. We, of course, attempted to resist this manifestly shelter-seeking maneuver by moving for a de novo trial. And although the Commission's counsel had told Judge Mansfield at the hearing on remand that he had "further evidence that (he wished) to offer" and that some of the evidence submitted at the hearing "might not be acceptable . . . . in a trial for permanent injunction", all of this was now jettisoned and the Commission's position, as stated in its brief in opposition to our motion, became the following: That while we would have the "opportunity to call witnesses or present any other evidence", they were under no such duty, and that

> "The presentation of the evidence, however, insofar as the Commission is concerned, will consist primarily of the record adduced at the hearing on the Commission's motion for preliminary injunction. . . ."

Apparently agreeing with the Commission's position, Judge Weinfeld denied our motion.

The "Trial"

The "trial" produced no surprises. The Commission did not have, and therefore did not offer, any further evidence, and if the defendants White and Blumberg had not been in Court, the trial would have consisted of the Commission's counsel offering the record of the hearing in evidence and resting.

Then, we would have rested, and the Judge would have retired to his chambers to read the record. That would have been the "trial".

The Advisory Committee Notes state that "This evidence need not be repeated at the trial. On the other hand, repetition is not altogether prohibited. . . . So also, some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction."

It is our position, of course, that in this case, since almost six years had passed, and since there was a different judge and since a de novo trial had been denied, the least we were entitled to was a complete re-reading of the record, so that proper objection could be taken to the admittedly inadmissible evidence which had entered the hearing. Denied this, the defendants were in every real sense denied a trial, and thus deprived of property without due process of law, in violation of the Fifth Amendment.

See *81 Harvard L. R. 591, 610*:

> "But there should be no undue strain to avoid repetition. Repetition may be desirable and even vital when finer details of proof are needed on trial than on the preliminary injunction, when there is a gap of time between the two proceedings and hence a loss of immediacy of impression or when the two proceedings are heard by different judges."

See, also, *Moore*, § 65.04(5).

There was no re-reading of any testimony.

The trial consisted of counsel for the Commission, the same Roger M. Deitz who had told Judge Mansfield that he had further evidence, calling the defendants Blumberg and White as his only witnesses.

The only purpose of this could have been to elicit proof of violations of the preliminary injunction—which, of course, had not happened—or some evidence of danger of future violations—which Judge Weinfeld, in his opinion, did find.

They were not subpoenaed and, had they not fortuitously been in Court, the Commission would have produced no witnesses.

Judge Weinfeld was disturbed by the defendants' "demeanor" and their "defiant attitude", as he said in his opinion (Appendix C, *infra*, p. 13(a)) and granted an injunction broader than that demanded in the complaint. Did Judge Weinfeld observe the demeanor of the Commission's witnesses from a reading of the cold record?

This Court, in *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1952) has considered—and rejected—this reasoning.

> "An individual proclivity to violate the statute need not be inferred from the fact that three violations were charged . . . the District Court was not dealing with a defendant who follows one adjudicated violation with others.
>
> * * * * *
>
> How much contrition should be expected of a defendant is hard for us to say."

c. The petitioners were entitled—even after the kind of trial this was—to have the Commission specify from a record involving 43 defendants precisely what it was that the petitioners were accused of doing, so that they could at least answer the charges in a brief.

Judge Weinfeld seemed to realize this, for at the end of the trial, he instructed Mr. Deitz, the Commission's counsel, as follows:

> "I will afford you an opportunity to submit a brief. . . . Pinpoint with respect to each defendant who still remains in the case the evidence upon which the Government relies in urging a permanent injunction, first, violation of the act, and second the basis upon which it urges its claim for a permanent injunction. . . ." (Tr. 123)

And again:

> "I went over your brief this morning but I think that you want to supplement it. . . I am suggesting that your brief should be directed to the basis, the factual basis upon which you claim violation of the statute by the defendants who still remain on trial and also the basis upon which you seek the permanent injunction." (Tr. 126)

The brief which was submitted did not pinpoint anything, any single fact of violation of the statute or any basis for a permanent injunction. The brief was a rehash of the brief which the Government had used in its motion for summary judgment and which Judge Motley had found insufficient. If the brief had "pinpointed" anything in the record, we could have responded to it.

The Opinions Below

We feel obligated to comment briefly, not only on the Court of Appeals' opinion, but also on Judge Weinfeld's opinion, "on the basis of (which) alone", the Court of Appeals said they would affirm, were it not for the due process claims. It was certainly "thorough," as the Court said, but it was also disingenuous, as the following quotations (with our comment) will show:

Judge Weinfeld's Opinion

> 1. "In September 1972, Judge Motley granted summary judgment against the corporation. . . . (Appendix C, p. 11(a)).

Comment: One would also never know from this statement that Judge Motley had denied summary judgment against White and Blumberg.

* * * * *

> 2. "Plaintiff at the trial, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure . . . (Appendix C, p. 12(a)).

Comment: There is no mention of the fact that there had been objection to this procedure, which had been overruled, or the basis of our objection.

> 3. "relied in large measure upon the substantial testimony of the twenty-four witnesses who testified . . . (Appendix C, p. 12(a), 13(a)).

Comment: "In large measure" is hardly accurate. "Entirely" would be more so.

> 4. "Plaintiff, in addition to the admissible evidence of the prior proceeding . . ." (Appendix C, p. 13(a)).

Comment: This is an oblique admission that there had also been inadmissible evidence which had been received by Judge Mansfield. Indeed, this had been admitted by the Commission's counsel.

* * * * *

5. "called at this trial as witnesses defendants Blumberg and White . . . (Appendix C, p. 13(a)).

Comment: We have already commented on this.

The Court of Appeals Opinion

Again, we will quote and comment.

"Appellants contend that they did not know at the time of the hearing at which preliminary injunctive relief was granted that the evidence then adduced would be used against them at the trial on the merits. But Rule 65(a)(2) itself gives notice that this may be done" (Appendix A, pp. 2(a), 3(a)).

Comment: This misses our point. Preparing for a hearing where the only requirement that the Commission had was to put in a prima facie case is one thing—preparing for a trial on the merits is a totally different thing. White's lawyer prepared for a hearing.

What we are challenging is not Rule 65(a)(2) but its application to the facts of our case.

Nor does it matter that, as the Court said, "Judge Weinfeld also gave appellants adequate notice before trial that he would rely on the preliminary hearing evidence" (Appendix A, p. 3(a)).

Notice more than five years after the hearing is not what due process requires.

As this Court has said in *Armstrong* v. *Manzo*, 380 U.S. 545 (1965):

> "A fundamental requirement of due process is "the opportunity to be heard". Grannis v. Ordean, 233 U.S. 385, 394, 34 S. Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner".

The only "meaningful time" at which we could have been heard would have been in a de novo trial.

Finally, the Court of Appeals reaches what they call our "most substantial argument", the lapse of time and different judges, and our claim that this mandated either a de novo trial or at the very least the re-reading of the testimony. After giving lip service to the Advisory Committee Note about the repetition of testimony, they say "The decision on whether to have repetition of testimony is one for the sound discretion of the trial judge. Judge Weinfeld did not abuse his discretion" (Appendix A, p. 3(a), 4(a)). But it is because we claim that Judge Weinfeld did abuse his discretion that we are here.

They conclude by saying that we had a "full opportunity to present evidence" and that "due process requires no more" (Appendix A, p. 4(a)).

We respectfully urge that due process does require more. Due process requires notice given at a meaningful time that we were to have our last day in Court. We did not have a "full opportunity to present evidence." This trial was not a trial at all. It was a travesty of a trial. And that is the whole point of this petition.

CONCLUSION

For all of the above reasons, the petition for certiorari should be granted.

Respectfully submitted,

SIDNEY SCHREIBERG
Attorney for Petitioners

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 531, 798—September Term, 1974.

(Argued February 13, 1975 Decided February 24, 1975)

Docket Nos. 74-1750, 74-1831

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

—against—

NORTH AMERICAN RESEARCH AND DEVELOPMENT CORP., EDWARD WHITE and ALFRED BLUMBERG,

Defendants-Appellants.

Before:

HAYS and FEINBERG, *Circuit Judges,* and HOLDEN, *District Judge.**

Appeal from order of the United States District Court for the Southern District of New York, Edward Weinfeld, *J.*, permanently enjoining appellants from violating registration and anti-fraud provisions of securities laws.

Affirmed.

SIDNEY SCHREIBERG, New York, N.Y., *for Defendants-Appellants White and North*

* Of the United States District Court for the District of Vermont, sitting by designation.

Appendix A—Opinion of the Court of Appeals

American Research and Development Corp.

ALFRED BLUMBERG, New York, N.Y., *Pro se.*
RICHARD E. NATHAN, Assistant General Counsel, Securites and Exchange Commission, Washington, D.C. (Lawrence E. Nerheim, General Counsel; David Ferber, Solicitor; Richard O. Patterson, Attorney, on the brief), *for Appellee.*

PER CURIAM:

In this action brought by the Securities and Exchange Commission (SEC), appellants White, Blumberg and North American Research and Development Corp. were enjoined by an order of the United States District Court for the Southern District of New York, Edward Weinfeld, *J.*, from committing further violations of various registration and anti-fraud provisions of the securities laws in connection with the offer and sale of shares in North American or any other securities. Judge Weinfeld wrote a thorough opinion, 375 F. Supp. 465 (1974), detailing the fraudulent practices appellants had engaged in. We would affirm on the basis of that opinion alone,[1] were it not for the claims pressed before us that appellants were denied due process by the application of Fed. R. Civ. P. 65(a)(2) in this case.

Appellants contend that they did not know at the time of the hearing at which preliminary injunctive relief was

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[1] That the SEC was required to meet a heavier burden at the trial on the merits than it did to obtain a preliminary injunction does not mean, as appellants contend, that the evidence which supported issuance of the latter is an insufficient basis for a permanent injunction. We agree with Judge Weinfeld that the evidence fully supports issuance of the permanent injunction.

granted [2] that the evidence then adduced would be used against them at the trial on the merits. But Rule 65(a)(2) itself gives notice that this may be done.[3] Judge Weinfeld also gave appellants adequate notice before the trial that he would rely on the preliminary hearing evidence. Appellants thus had the opportunity to object to inadmissible items, to recall and cross-examine SEC witnesses, to call defense witnesses, and otherwise to present a defense.

Appellants' most substantial argument is that the five-year time lapse and change in judges between the hearing on the preliminary injunction and the trial on the permanent injunction necessitated a de novo trial or at least a formal reading into the record of the transcript of the preliminary hearing. The 1966 Advisory Committee Note to the amendment of Rule 65 states that "some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction." It is clear, however, that the decision on whether to have repetition of testimony is one for

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[2] After a seven-day hearing before then District Judge Mansfield, he granted a preliminary injunction against White and North American but denied it as to Blumberg, 280 F. Supp. 106 (S.D.N.Y. 1968). This court affirmed as to the former, but reversed as to Blumberg and remanded for further proceedings. 424 F.2d 63 (2d Cir. 1970). Thereafter, a preliminary injunction was entered against Blumberg. The SEC then sought to make the injunction against appellants permanent by moving for summary judgment. This was denied by Judge Motley, 59 F.R.D. 111 (S.D.N.Y. 1972); see note 4 *infra*.

[3] Rule 65(a)(2) provides that even when consolidation of the preliminary injunction hearing and the trial on the merits is not ordered (it was not here), "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes a part of the record on the trial and need not be repeated upon the trial."

the sound discretion of the trial judge. Judge Weinfeld did not abuse his discretion. The parties were given "a full opportunity to present evidence in the case." 7 J. Moore, Federal Practice ¶ 65.04[4] at 65-66 (2d ed. 1948). Due process requires no more.[4]

Affirmed.

[4] Judge Motley's opinion denying summary judgment, see note 2 *supra*, was based primarily on due process considerations and construction of Rule 65(a)(2). She did not allow the preliminary hearing testimony to be used as the basis for granting summary judgment against appellants, although she pointed out that the SEC was free under Rule 65(a)(2) to use that evidence at the trial on the merits. Now that the SEC has followed that suggestion, the due process considerations are completely different, since appellants have had the opportunity to litigate fully all issues of fact and law. As Judge Motley wrote, "defendants were rightfully entitled to expect that they would have a further day in court" after the preliminary injunction hearing. 59 F.R.D. at 114. Appellants now have had their trial before Judge Weinfeld. It is no denial of due process if they chose not to present any evidence there.

APPENDIX B

Order Appealed From

Upon the complaint filed in this action on September 27, 197. ., upon argument and evidence presented by the plaintiff and defendants, upon the Opinion, Findings of Fact and Conclusions of Law of United States District Judge Edward Weinfeld filed March 8, 1974, and upon all other papers and proceedings herein, and the Court having considered the matter and being duly advised, and there being no just reason for delay in issuing this Judgment, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendants North American Research and Development Corporation, Edward White ("White"), K. Ralph Bowman ("Bowman"), and Alfred Blumberg ("Blumberg"), their agents, servants, employees, attorneys and those in active concert or participation with them, and each of them, be and hereby are permanently enjoined from directly and indirectly, singly and in concert, in the absence of applicable statutory exemptions:

(1) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell through the use or medium of any prospectus or otherwise or to carry or cause to be carried any securities of North American Research and Development Corp. or any other securities, unless and until a registration statement is filed with the Securities and Exchange Commission as to such securities;

(2) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell securities of North American Research and Development Corp. or any other securities through the use or medium of any pros-

pectus or otherwise, unless and until a registration statement is in effect with the Securities and Exchange Commission as to such securities;

(3) Carrying securities of North American Research and Development Corp. or any other securities or causing them to be carried through the mails or in interstate commerce by any means or instruments of transportation for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the Securities and Exchange Commission as to such securities; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants North American Research and Development Corporation, White, Bowman and Blumberg, their agents, servants, employees, attorneys, and those in active concert or participation with them, and each of them, be and hereby are permanently enjoined from, directly and indirectly, singly and in concert:

Employing any device, scheme or artifice to defraud, engaging in any acts, practices or courses of business which operate or would operate as a fraud and deceit upon purchasers and prospective purchasers, making any untrue statements of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading in connection with the purchase, offer or sale of securities of North American Research and Development Corporation or any other securities while making use of any means or instrumentality of interstate commerce or of the mails, or of any means or instrument of

transportation or communication in interstate commerce.

s/ EDWARD WEINFELD
United States District Judge

Dated: New York, New York
March 25th, 1974

JUDGMENT ENTERED: 3-26-74
s/ RAYMOND F. BURGHARDT
Clerk

A TRUE COPY

RAYMOND F. BURGHARDT, Clerk

By G. HARBISON,
Deputy Clerk

APPENDIX C

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civil 3724

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—against—

NORTH AMERICAN RESEARCH AND DEVELOPMENT CORP., et al.,

Defendants.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Appendix C—Opinion of the District Court

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Pro Se

EDWARD WEINFELD, *D. J.*

This action was commenced in September 1967 by the Securities and Exchange Commission (SEC) against North American Research and Development Corporation (North American) and forty-two other defendants for a permanent injunction against continued violations of the registration [1] and anti-fraud provisions of the Securities Act of 1933 [2] and the Securities Exchange Act of 1934 [3] and the rules and regulations thereunder.[4] In essence, the defendants were charged, singly and in concert, with selling blocks of unregistered North American stock and with fraudulent conduct in the sale of the stock. As the case progressed from the commencement of suit, when plaintiff applied for preliminary injunctive relief, through an appeal and remand as to some defendants, permanent injunctions or other dispositions were entered as to all defendants except North American, Edward White, its chief executive officer, K. Ralph Bowman, its secretary-treasurer, and Alfred Blumberg, a stock broker who was president of an inactive brokerage firm and who had been

[1] Sections 5(a) and 5(c), 15 U.S.C. §§ 77e(a), (c) (1970).
[2] Section 17(a), 15 U.S.C. § 77q(a) (1970).
[3] Section 10(b), 15 U.S.C. § 78j(b) (1970).
[4] Rule 10b-5, 17 C.F.R. 240.10b-5 (1973).

engaged in various aspects of the securities business. As to the latter four, preliminary injunctive relief was in effect pending a trial on the merits.[5]

Plaintiff's motion for preliminary injunctive relief was based upon extensive affidavits and testimony taken before then District Judge Walter R. Mansfield. The hearing extended over seven days in January 1968, during which twenty-four witnesses, including the defendants White, Bowman and Blumberg testified. Thereafter, in February 1968, Judge Mansfield rendered a decision and made extensive findings and conclusions of law to the effect that plaintiff had established a strong prima facie case.[6] Preliminary injunctive relief was granted against most defendants, including North American, White and Bowman; it was denied as to seven defendants, including Blumberg. Upon cross-appeals the order was upheld except insofar as it denied injunctive relief against Blumberg and others, and accordingly was remanded for further proceedings.[7] Upon remand, although afforded the opportunity to introduce additional evidence, Blumberg, as well as the others, elected to stand on the existing record. After hearing oral argument, Judge Mansfield found that Blumberg had violated the registration and anti-fraud provisions of the securities acts in the sale and distribution of North American stocks, and granted a preliminary injunction against

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[5] Thirty-four defendants were permanently enjoined, twenty-one by consent and thirteen by default. The action was discontinued against three defendants who stipulated to comply with the acts and rules, and upon their undertakings such an order was entered. The complaint was dismissed as to one defendant because of death, and one defendant, a Canadian citizen, was never served with process.

[6] *SEC* v. *North American Research & Dev. Corp.*, 280 F. Supp. 106 (S.D.N.Y. 1968).

[7] 424 F.2d 63 (2d Cir. 1970).

him. In September 1972, Judge Motley granted summary judgment against the corporation, North American and Bowman, finding that each had violated the registration and anti-fraud provisions of the securities acts as alleged in the complaint, but reserved for trial the scope of injunctive relief, if any, to be issued against them. Thus, the unresolved issues now before the court are on plaintiff's application for final judgment against White and Blumberg, and if plaintiff sustains its burden of proof, the scope of the relief to be granted against them, North American and Bowman.[a]

The key figure in the affairs of North American was the defendant Edward White, who conceived a scheme to acquire a worthless corporate shell through control of the issued stock of an inactive publicly-held corporation, North American, formerly Utah Fortuna Gold Company. White and the other defendants were charged with promoting distribution of the balance of the issued stock with a view of introducing it onto the over-the-counter market in the United States, creating a demand for it, instigating the trading of it, and running up its market price, all for the benefit of himself and a group working with him in the distribution of the stock. A thumbnail sketch of the scheme is succinctly set forth by Judge Mansfield:

> "On April 27, 1967 White acquired control of such a worthless corporate shell, a Utah company called Utah Fortuna Gold Company, the name of which was later changed by him to North American. Altohugh no market for its stock had ex-

[a] When the case was called for trial, Bowman's counsel stated that Bowman would consent to a final judgment of permanent injunction. The court has since been advised that thus far he has not signed the consent to the permanent injunction.

> isted for years, within three months, as the result of a carefully laid and executed plan of the White-Freeman-Naft trio, approximately 200,000 shares of its stock was distributed via Canadian accounts to broker-dealers and the public in the United States, trading of the stock was initiated on the over-the-counter market, and the price of the stock, as a result of the group's skillful promotion, was run up during the same short period from ½ cent per share over-the-counter to more than $6.00 per share, or more than 1200%, even though the corporation did not carry on any commercial operations during the period and its assets were of doubtful value. On July 20, 1967, the bubble burst when trading in the shares was suspended by the SEC".[9]

The fraud charge centered about a "Progress Report" of North American and oral statements and representations made by individual defendants to dealers and investors. The charge was that the "Progress Report" omitted any financial information and was false and misleading in various other respects, including its portrayal of men working at the North American plant, which gave the impression that it was currently in operation in July 1967, when in fact the plant had not been operating or in production since 1964. The report was distributed to various stock brokers and investors in the United States and was one of the principal methods used to sell and distribute in the United States shares of North American.

Plaintiff at the trial, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, relied in large

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[9] *SEC* v. *North American Research & Dev. Corp.*, 280 F. Supp. 106, 112 (S.D.N.Y. 1968).

measure upon the substantial testimony of the twenty-four witnesses who testified and the numerous exhibits admitted in evidence during the seven-day hearing before Judge Mansfield on the motion for preliminary injunctive relief. This court has read and studied the voluminous transcript of that hearing. Plaintiff, in addition to the admissible evidence of the prior proceeding, called at this trial as witnesses defendants Blumberg and White, each of whom, as already noted, testified at the hearing on the motion for preliminary injunctions, at which they were represented by their respective counsel.[10] Judge Mansfield's decision was based, as he noted, not only upon the affidavits submitted by the parties, but upon his "observance and careful appraisal of the witnesses"[11] who testified before him with respect to disputed fact issues. This court, too, has had the opportunity to observe the demeanor of the two defendants White and Blumberg. Each impressed this court as evasive and at times non-responsive, with a quick and glib explanation for questioned conduct. The printed record of the proceedings before Judge Mansfield also demonstrates in instance after instance evasiveness on the part of these witnesses and a lack of forthrightness in response to questions. Upon the entire record I find the plaintiff has fully sustained its burden of proof that the defendants White, Blumberg and Bowman each violated, and participated in the violation by other defendants of, the registration and anti-fraud provisions of the securities acts, as alleged in the complaint. Plaintiff accordingly is entitled to judgment on the merits.

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[10] The defense at this trial was, of course, free to call any witness or offer any additional evidence, but failed to do so.

[11] *SEC* v. *North American Research & Dev. Corp.*, 280 F. Supp. 107, 111 (S.D.N.Y. 1968).

There remains the issue of the scope of relief. Plaintiff seeks to enjoin the defendants not only against continued violations as to North American securities, but also as to any other security. The defendants oppose any injunctive relief (1) upon a claim that since the SEC suspended trading with respect to North American stock in 1967 no sales have occurred, and (2) that as to other securities there is no showing defendants are likely to engage in illegal activities.

As to the North American stock, which remains unregistered to this date, the record establishes such deliberate conduct in its sale and distribution, in violation of sections 5(a) and 5(c) of the Securities Act of 1933,[12] that there can be no serious question that plaintiff is entitled to the injunctive relief it seeks.

As to other securities, the defendants' past actions and their pervasive conduct with respect to North American, which furnishes a clue to their general attitudes, justify such relief. The defendant Blumberg's violations were not isolated. He made fraudulent statements to a number of persons in the sale of the stock; he was active, in concert with other defendants, in promoting the sale of stock. Blumberg, in addition to acting as a conduit in the sale of shares, distributed copies of the "Progress Report."

Similarly, Bowman was deeply involved as secretary-treasurer in the illicit distribution of the stock. He was instrumental in locating the shell corporation, and from the start was in on the scheme involving North American and worked closely with White and others. He played a major role in the preparation of the false and misleading Progress Report. Bowman, with respect to other

[12] 15 U.S.C. §§ 77e(a), (c) (1970).

securities, had previously been enjoined from violating sections 5 and 17 of the Securities Act of 1933.

As to White, a self-styled promoter, principally of mining stocks, and a securities trader, he was the central figure, if not the mastermind, of North American's illicit activities. He has engaged extensively in the promotion of other securities. He was chief executive of a Canadian securities underwriting corporation, whose license was revoked by the Canadian authorities. White continues to maintain a stubborn, even defiant attitude that the North American securities are exempt under Section 3(a)(1) of the 1933 Act and also as to the probity of the Progress Report, despite express determinations by the Court of Appeals to the contrary—an attitude that hardly betokens likelihood of compliance with the securities laws.

Each defendant was an active participant with one or more of the other defendants who have heretofore been permanently enjoined from violations of the securities acts with respect to any security; no good reason appears why in the light of their activities the scope of the injunction issued against the current defendants should be less onerous than that imposed upon the codefendants. Nothing in the record as to the current defendants suggests recognition of the wrongfulness of past illicit conduct or offers the promise of future compliance with the securities laws. Under the circumstances, a permanent injunction against future violations of the securities acts is justified.[13]

The foregoing, together with the following, shall constitute the Court's Findings of Fact and Conclusions of Law:

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[13] *Cf. SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972).

Appendix C—Opinion of the District Court

FINDINGS OF FACT

Acquisition of Control by White

1. The defendant White, who had been an active promoter of mining stocks of companies controlled by him, manifested in March 1967 an interest in acquiring control of a corporate shell as the first step in a scheme already referred to, whereby he and others then promoted the sale of stock previously acquired, created a demand for it, and unloaded a substantial portion of their shares upon the purchasing public at greatly inflated prices by fraudulent and manipulative means. Actively associated with him in this scheme from the outset were Sam Freeman, a friend and a Toronto broker, and defendant K. Ralph Bowman, through whose efforts the Utah Fortuna Gold Company, the empty corporate shell, was located.

2. All but 600,000 shares of the 1,800,000 shares of this inactive company, which White admitted was "virtually worthless," were held by South Utah Mines. Robert A. Johnson, in March 1967, was an officer and director of both companies, as well as the transfer agent of Utah Fortuna Gold Company; he also exercised the "managerial and financial inclusions" of Mrs. Mabel McMcGarry, who was the owner of approximately 75% of South Utah Mines.

3. Further, in the latter part of March 1967, after obtaining authority from Mrs. McGarry to sell the 1,200,000 Utah Fortuna Gold Company shares held by South Utah, agreed to sell the control stock to Whitney, and through him to those whom Whitney represented; on April 27 the sale to Whitney was offered, Whitney

immediately resold 1,000,000 shares to White and his nominee, Sonia Starr; as prearranged with Johnson, he also transferred 100,000 shares to his (Whitney's) brother and mother 100,000 shares to one Glenn, as finders' fees.

Acquisition of Publicly-Distributed Shares

4. It was arranged between Freeman, White and Bowman that any additional shares (beyond those acquired by White) would be purchased by the Toronto brokerage firms of J. P. Cannon & Co. (Cannon) and Larzs Hagglof & Co., Ltd. (Hagglof). Whitney's brother and Glenn, upon receipt of the finders' fees shares, sold them to Cannon in Toronto. At the same time, Freeman and Frank Naft, who were White's principal associates, instructed Cannon to purchase shares to be offered from Salt Lake City for the accounts of their wives and Freeman's mother-in-law. Subsequent instructions provided for purchases in the names of friends and other relatives.

5. Thereafter, during the period from April 24 to June 6, 1967, through the activities of Bowman, Whitney and Johnson, 553,000 additional shares of Utah Fortuna Gold Company (later North American) were acquired from former stockholders, which shares, together with the 200,000 finders' fees shares, making a total of 753,000, were sold to Cannon and Hagglof as instructed by White, Freeman and Naft.

By June 27, 1967, approximately 96.8% of the 1.8 million shares of the company outstanding was under control of the White-Freeman-Naft trio, including the one million shares held by White and his nominee Sonia Starr, and 753,000 shares acquired through Cannon and

Hagglof held in the names of close friends and relatives of the trio. The methods and means of acquisition and the relationship between the White-Freeman-Naft trio and the parties in whose names the stock was held in Toronto indicate that the 753,000 shares were acquired in Toronto with a view to the distribution of all or a very substantial portion of it in the United States.

Promotion and Distribution

6. White and his associates took steps to effect a successful redistribution of the shares in the United States. Originally he had planned to transfer some Canadian mining claims to the corporation and then to promote trading in the company's stock; however, when in Salt Lake City in April 1967 to further his purchase of control of Utah Fortuna Gold Company's outstanding stock, a new and more attractive basis for promotion of the stock presented itself.

The Storrs Process

7. Bowman, who, as noted above, was a key figure in the acquisition of shares from former stockholders, was the president and controlling stockholder of Thermal Dynamics Corporation (Thermal); Whitney, his partner in the acquisitions, was its secretary.

8. Thermal owned rights to a method by which allegedly pollution-free coke might be produced commercially, called the Storrs Process, and owned an inoperative pilot plant that had been built to test production under the process. White decided to use the Storrs Process as the basis for promoting the sale of Utah Fortuna Gold Company stock. To further that objective, on May 19, 1967, Utah Fortuna Gold Company acquired all the assets of Thermal, including the patent application on the Storrs Process, described as an auto-air pollution device that converted coal into coke.

9. Bowman, in return, received a right to royalties on any coke that might ultimately be produced and 330,000 Utah Fortuna Gold Company shares.

10. The corporate name of Utah Fortuna Gold Company was changed to North American Research and Development Corporation (North American) at a June 19, 1967 stockholders' meeting, at which White voted proxies for 1,500,000 of the total of 1,800,000 shares outstanding. White was then elected chairman of North American's board of directors; Louis Dillman, a Canadian friend of White, its president; and Bowman, its secretary-treasurer.

The "Progress Report"

11. White and Dillman, with a professional writer not named as a defendant, then prepared a "sales brochure in the form of a 'Progress Report' pertaining to North American," which was intended as, and in fact was, one of the principal means used to effect distribution into the United States of approximately 200,000 shares held in Toronto accounts.

12. Although the number of minority shareholders prior to White's acquisition varied between about fifty and eighty, which number was necessarily reduced by the time that the White-Freeman-Naft trio had acquired control of 96.8% of the outstanding shares, 1,000 copies of the report were printed and between 200 and 250 were or were caused to be distributed by White, Bowman and North American to stock brokers, registered representatives and other prospective purchasers.

13. The Progress Report was materially false and misleading. It painted a glowing picture of a pollution-

free fuel market in which the Storrs Process would play a leading part. The report, among other matters, stated that independent tests and appraisals by leading engineering firms indicated a tremendous sales potential; that North American envisaged processing plants strategically located in or near coal mining centers directly owned by the company or by others under a lease or royalty agreement. The rosy picture was furthered with statements that a large market exists in the western United States, with the prospect that a similar demand could be developed throughout the United States and other highly industrialized countries. The report conveyed the impression, contrary to the fact, that North American had the productive capacity and the financial resources to satisfy current as well as potential market demands and to carry out an extensive program of expansion of processing plants in or near coal mining centers.

The report also conveyed the false impression that the plant was in operation in July 1967, when it was distributed to various persons in the United States. Thus, it contains photographs of various units of the plant and process, some of which are entitled "Scenes of Pilot Plant," with men working at the machinery, with the implication of an ongoing operation and current activity. The fact is that the pilot plant had not been operated since 1954 and the economic practicality of reopening the plant required further study.

There were other misleading statements in the report. Thus, as to the statement that other processing plants would be established around coal mining centers either owned by the company or by others under a lease or royalty agreement, already referred to, the company had no intent to own any of such allegedly contemplated processing plants. White testified to this effect—indeed North American was without the financial resources to

undertake such ownership, which involved a capital cost of approximately $450,000 per plant. When the report was disseminated, North American had less than $50,000 available, of which $30,000 would be required to put the pilot plant in operation.

The report suggested that the commercial feasibility of the Storrs Process had been demonstrated. It referred to "Previously conducted feasibility studies . . ." which "indicated that a profitable operation can be anticipated," and suggested that immediate and further tests shall serve to "verify the commercial value of the process." Thus, it conveyed the impression of a profitable operation with verification being in the nature of a pro forma review. White, however, testified that the very first problem to be faced was the question of the feasibility itself.

The defendants' own witness, Charles S. Davis, a consulting engineer, who investigated the plant in May 1967, testified that a feasibility study would take about thirty to sixty days actually running the pilot plant, and only after $30,000 was spent to put it "back into first class operating condition." The Lummus Company recommended a thirty-day trial to determine the feasibility of the process.

The failure of the report to disclose that feasibility studies were required which would take some time before a determination could be made that the plant could be economically operated was a material omission.

Other respects in which the report is misleading and abounds in "ambiguities" and "half truths" are set forth in the opinion of the Court of Appeals.[14]

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[14] *SEC* v. *North American Research & Dev. Corp.*, 424 F.2d 63, 75-77 (2d Cir. 1970).

Individual Promotional Efforts of Certain Defendants

14. Meanwhile, White, Freeman and Naft had begun promoting the stock to broker-dealers in the United States with a view toward its introduction in the over-the-counter market at the end of June 1967. For example, White and Freeman flew to Los Angeles after the June 19 stockholders' meeting and, with no financial data or other detailed information available, resorted to touting tactics for the benefit of officers and registered representatives of at least two brokerage firms, Bache & Co. and Bateman Bichler, Hills Richards, Inc. They represented that they believed that the company had great prospects. To dramatize the Storrs Process and their purported estimates of the large potential market for anti-pollution coke they displayed a sample of coke, the clear implication being that it had been successfully produced at the pilot plant, although the plant had not operated since 1964.

15. They advised that trading in the shares from the Cannon firm in Toronto would commence in the Los Angeles market on about the 26th or 27th of June "around the $3 range or below" and they made available copies of the "Progress Report." In their efforts to promote the stock, Freeman opined the stock might go up to $100, but White suggested they were going to take it slowly up to $10; that it was had for a stock to move too fast and that if it went up to 100 that it would attract the attention of the SEC.

16. White also discussed North American with at least two more brokers and actually placed orders for North American stock for at least two persons.

Alfred Blumberg

17. The aid of others was also enlisted in the scheme of distribution. Blumberg was one such person. He was no stranger to the securities industry. He was president of S. J. Rothman & Co., an inactive New York City brokerage firm, of which he was a principal stockholder and which was registered as a broker-dealer with the Commission from August 1967 to June 1968. He was employed as a registered representative from October 1956 to the spring of 1960 and again in 1962, 1965, 1966 and 1967. He has been a finder and has been so recognized on prospectuses issued in connection with the public sale of securities.

18. Blumberg recommended to and caused the purchase of North American shares by a number of his customers and in instances failed to disclose material facts which he knew, or misrepresented facts, or failed to give complete information as to North American; he solicited the purchase of North American shares and distributed the Progress Report and thereby caused purchases of unregistered shares; he played an active and knowing role in aiding and abetting the principals in the distribution of unregistered stock, as hereinafter indicated.

19. Blumberg and White first discussed North American in Canada. In the early part of June 1967, Blumberg and Morris M. Cooper (Cooper) met White and Freeman in Toronto, Canada; the same four and Naft met in Toronto about two weeks later when Blumberg told White that if White was "going into the pollution deal as a public company he would like to see it"; this meeting occurred shortly before the North American stock was to trade. Blumberg met White a third time, in the company of Cooper, when White showed them a copy of "The Lummus Report," which concerned the extraction of sulphur from coal through heating.

20. In the latter part of June, 1967, Blumberg recommended and touted North American among his customers, friends and associates. At least a score of persons purchased North American shares through the activities of Blumberg. The shares were purchased by such persons upon his recommendation through Dunhill Securities Corp. (Dunhill), a broker-dealer doing business in New York City; other purchases of North American shares were made through Dunhill by Blumberg or persons whose discretionary accounts he handled, or for whom he had authority to act. His purpose in recommending that his customers use the services of Dunhill was to keep the continuity of his clientele until he became established in the securities industry, since he intended to make his living from commissions. All the facts and circumstances surrounding his activities warrant a finding that Blumberg was instrumental in linking Dunhill with its Canadian sources of supply of North American securities.

21. Blumberg had discretion over or purchased for the accounts of Donald Bachman, Diam Trading, S. J. Rothman, Stanley Snyder and Edwin Medlinger, and handled the account of his mother, to whom he recommended the purchase of North American shares.

22. Based upon Blumberg's recommendation, the following persons purchased North American: Myron Thaler, Linda Winokur, Stephen Downey, Milton Jacobs, Muriel Begleiter, Lisa Greenberg, Peter Diaz, Bernard Bernbaum, Adele Spurio, Louisa Corby, Max Jacob and Sheppard Spies.

23. Solomon Schneider (Schneider), who believed Blumberg was in the securities business, upon his recommending North American, purchased 300 shares. Schneider wanted to sell the stock, but didn't at the

suggestion of Blumberg, who told him that General Electric was going to build a plant for North American which would make it more feasible, and that the North American stock should be a good investment.

24. Murray Cousins, who believed Blumberg was in the brokerage business, purchased 300 shares of North American, relying on the recommendation of Blumberg. Blumberg represented to Cousins that North American was dealing in a fuel to eliminate air pollution and also stated the stock was a good stock, a good buy, and that it would go up. Blumberg gave Cousins the impression that he, Blumberg, was connected with persons involved in North American and that he was a member of the group.

25. Joseph Corby purchased 500 North American shares on Blumberg's recommendation. Blumberg told Corby that North American had a pilot plant and a process for extracting pollutants from coal; that the process had been proven, and that North American had contracts pending with utility companies who use coke in generating steam and electricity. Corby relied upon Blumberg, in part, because his background in the securities industry qualified him to "analyze a stock thoroughly."

Present Activities of White, North American, Blumberg and Bowman

26. White is associated with several public companies.

27. White is an officer or director of several public companies in addition to North American. He is president of Illumino Devices. Its shares are traded in the

United States, and it issues periodic reports to its shareholders.

28. He is also president of Weege Uranium, Jandon Mines, and Larenim Securities, all located in Canada.

29. Larenim Securities was an underwriter of securities in Toronto. Based upon the North American violations, its license as an underwriter was revoked.

30. White has security brokerage accounts with one broker in the United States and five brokers in Canada. The total value of White's portfolio is half a million dollars.

31. When the market was doing better, White was a "very big trader."

32. As already noted, despite findings by the United States District Court and the United States Court of Appeals to the contrary, White continues to maintain that the Progress Report is "absolutely a fact and the truth." It has not been revised or rescinded. Also he continues to maintain that the shares of North American need not be registered.

33. White has caused many progress reports to be issued for other companies he owns or with which he is associated.

34. Presently, North American is not an operating company. It is however, attempting to revive itself, and has negotiated a contract for a feasibility study of the Storrs Process.

35. White continues to own one million North American shares.

36. Blumberg has been suspended by the Commission from association with any broker or dealer, for sixty days, a suspension that was imposed as a result of the violations that are the basis for this injunction.

37. Nevertheless, Blumberg did not think that it deserved the time or the effort to research North American at the time he decided to buy for himself and others, and would so conduct himself if faced with a similar situation again.

38. Ned J. Bowman Company was registered as a broker-dealer from March 30, 1954 to May 16, 1960, and the defendant Bowman was vice president and a director of Ned J. Bowman Company. He owned 10% or more of the equity securities of the said firm.

On April 18, 1955, in an action commenced by the Commission in the United States District Court for the District of Utah, Ned J. Bowman Company was enjoined from further violations of section 5 of the Securities Act in connection with the sale of Lavender Uranium Corp. stock.

After the institution of administrative proceedings, the Commission, on May 16, 1960, revoked the registration of Ned J. Bowman Company with the Commission. There, the Commission found that Bowman violated sections 5 and 17 of the Securities Act and sections 10(b) and 15(c)(1) of the Exchange Act in connection with offers and sales of Lavender Uranium Corp. stock.

Appendix C—Opinion of the District Court

In administrative proceedings instituted by the Commission against Jonathan & Co., Inc., formerly registered as a broker-dealer, the Commission, on June 30, 1949, revoked the registration of Jonathan & Co. on the basis, among other things, that it had not been appropriately disclosed in filings with the Commission that a branch office of the firm had been sold to four persons who were nominees of Bowman.

On January 26, 1965, a Judgment of Permanent Injunction was entered in the United States District Court for the District of Utah in an action commenced by the Commission enjoining Bowman and Thermal Dynamics Corp. (Thermal) from further violations of sections 5 and 17 of the Securities Act, in connection with the sale of Thermal stock. Thermal formerly owned the rights in the United States to the Storrs coking process, which, as mentioned above, were transferred to North American. Misrepresentations respecting this process were the principal means by which the defendants illegally distributed North American stock to investors in this country.

39. Since the filing of this action to enjoin K. Ralph Bowman from any further violations of the registration and anti-fraud provisions of the federal securities laws Bowman has continued to violate those laws. On June 6, 1969, Judge Thomas F. Murphy of the United States District Court for the Southern District of New York issued a preliminary injunction enjoining Bowman from further violations of the registration provisions of the Securities Act in the offer and sale of the common stock of the Dumont Corporation.

On November 14, 1969, after trial, Judge A. Sherman Christensen of the United States District Court for the

District of Utah issued a permanent injunction which enjoined Bowman from violating the registration requirements of the Securities Act with respect to the securities of the Top Notch Uranium & Mining Corporation or any other securities.

40. Blumberg sold 500 North American shares, and realized a profit on those sales.

41. No registration statement has ever been filed with the Commission as to the securities of North American.

42. The means and instrumentalities of interstate commerce or of the mails or means or instruments of transportation or communication in interstate commerce were used in connection with the activities described above.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the defendants and matters alleged as violations of law herein.

2. Neither the securities nor the transactions alleged herein to be in violation of section 5 of the Securities Act were exempt under either section 3 or 4 of that Act.

3. From on or about April 27, 1967, White, Blumberg and Bowman directly and indirectly, singly and in concert, violated and aided and abetted others in the violations of section 5(a), 5(c), and 17(a) of the Securities Act of 1933, 15 U.S.C. 77e(a), 77e(c), and 77q(a), section 10(b) of the Securities Exchange Act of 1934, 15

U.S.C. 78j(b) and Rule 10b-5 thereunder, 17 CFR 240.10b-5 in that they:

(a) Made use of the means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell through the use or medium of any prospectus or otherwise or to carry or cause to be carried securities of North American Research and Development Corporation, before a registration statement was filed with the Securities and Exchange Commission as to such securities;

(b) Made use of the means or instruments of transportation or communication in interstate commerce or of the mails to sell such securities through the use or medium of a prospectus or otherwise, before a registration statement was in effect with the Securities and Exchange Commission as to such securities;

(c) Carried such securities or caused them to be carried through the mails or in interstate commerce by the means or instruments of transportation for the purpose of sale or delivery after sale, before a registration statement was in effect with the Securities and Exchange Commission as to such securities;

(d) Employed devices, schemes or artifices to defraud, engaged in acts, practices or courses of business which operated or would operate as a fraud and deceit upon purchasers and prospective purchasers, made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, misleading in connection with the purchase, offer

or sale of such securities while making use of the means or instrumentality of interstate commerce or of the mails, or of the means or instruments of transportation or communication in interstate commerce.

4. Permanent injunctive relief is essential to protect the public against these and other illegal acts and transactions of White, North American, Blumberg and Bowman with respect to the securities of North American or any other securities in the future. Unless so enjoined, there is reasonable likelihood that these defendants might continue to engage in violations of the securities laws.

Judgment may be entered accordingly.

Dated: New York, N. Y.
March 8, 1974

EDWARD WEINFELD
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1436

EDWARD WHITE AND ALFRED BLUMBERG, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

After a trial in the United States District Court for the Southern District of New York, petitioners were found to have violated, and to have aided and abetted others in violating, the registration provisions of the Securities Act of 1933, 15 U.S.C. 77e, and the anti-fraud provisions of that Act (15 U.S.C. 77q(a)) and the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 issued thereunder, 17 C.F.R. 240.10b-5 (Pet. App. B, pp. 5a-7a; 375 F. Supp. 465). Petitioners were permanently enjoined from violating those provisions (Pet. App. B, pp. 5a-7a). The court of appeals affirmed *per curiam* (Pet. App. A, pp. 1a-4a).

1. In September 1967, the Securities and Exchange Commission sought permanent injunctions against 43 defendants, including petitioners, alleged to have violated the registration requirements of the Securities Act of 1933[1], and the anti-fraud provisions of both that Act[2] and the Securities Exchange Act of 1934,[3] in connection with the offer and sale of securities issued by North American Research and Development Corporation. The Commission promptly moved for a preliminary injunction before then District Judge Mansfield, who granted the Commission's motion as to some defendants and denied it as to others. *Securities and Exchange Commission* v. *North American Research & Development Corp.*, 280 F. Supp. 106 (S.D. N.Y.). On appeal, the court of appeals (424 F.2d 63 (C.A. 2)) affirmed the district court order insofar as it granted preliminary relief against 14 defendants, including petitioner White, and reversed insofar as it denied preliminary relief against four defendants, including petitioner Blumberg.

On July 14, 1972, the district court (per Judge Motley) denied the Commission's motion for summary judgment against petitioners (*Securities and Exchange Commission* v. *North American Research and Development Corp.*, 59 F.R.D. 111 (S.D. N.Y.)). On June 27, 1973,

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[1]Section 5(a) and (c), 15 U.S.C. 77e(a) and (c).

[2]Section 17(a), 15 U.S.C. 77q(a).

[3]Section 10(b), 15 U.S.C. 78j(b); Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5.

the trial was held before Judge Weinfeld on the Commission's request for permanent injunctive relief.[4]

At trial, the Commission substantially relied on the evidence that had been admitted in the 1967 hearing on its request for preliminary injunctive relief. In addition to introducing the record of that proceeding, the Commission called petitioners as witnesses. Petitioners called no witnesses and did not testify in their own behalf.

The district court concluded (Pet. App. C, p. 13a) that based "[u]pon the entire record" petitioners had violated the federal securities laws and should be permanently enjoined. The court found that petitioner White was the "central figure, if not the mastermind" of (Pet. App. C, p. 15a), and that petitioner Blumberg "played an active and knowing role in aiding and abetting the principals" in, a fraudulent scheme whereby a public distribution of stock of an inactive corporation without assets was accomplished by use of a materially false and misleading "Progress Report" (*id.* at 19a-23a).

2. Petitioners' sole claim is that they were denied a fair trial by the district court's admission into evidence of the record of the prior preliminary injunction pro-

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[4]At the time of trial, only 4 of the original 43 defendants remained in the case—petitioners, and K. Ralph Bowman and North American Research and Development Corporation. Since the district court had previously granted the Commission's motion for summary judgment as to Bowman and North American on the question whether they had violated the securities acts (59 F.R.D. 111, 115), the only issue concerning them at trial was whether permanent injunctive relief should be granted.

Of the other original defendants, permanent injunctions had been entered against 21 by consent and against 13 others by default; the action had been discontinued as to three peripheral participants who executed undertakings to comply with the registration and antifraud provisions of the securities laws; and the complaint had been dismissed as to one corporate defendant after the death of its principal officer. One person named as a defendant in the complaint—a Canadian citizen—was never served.

ceedings. This contention was correctly rejected by the court of appeals, on whose opinion we principally rely.

Petitioners' contention (Pet. 8) that they did not know at the time of the preliminary injunction proceedings that evidence admitted therein could be used at the trial on permanent relief is baseless. As the court of appeals noted (Pet. App. A, p. 3a): "Rule 65(a)(2) [Fed. R. Civ. P.] itself gives notice that this may be done."[5]

Petitioners' suggestion (Pet. 7-12) that, because the evidence at trial consisted substantially of the record of the preliminary injunction proceedings, they were deprived of a trial on the merits regarding permanent relief is equally baseless.[6] Petitioners were informed by the district court that the prior record would be admitted, and they were not precluded from objecting to any portion of it on evidentiary grounds, recalling witnesses for cross-examination, or presenting an affirmative defense. Indeed, having knowledge that the Commission intended to rely on the prior record, petitioners had the unusual advantage of being able to plan their defense to respond to the evidence they knew the record to contain. See *Carter-Wallace, Inc.* v. *Otte*, 474 F.2d 529, 537 (C.A. 2). For reasons best known to themselves, they chose not to pursue these options and they cannot now seek to be relieved of the consequences of their decision.

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[5]Rule 65(a)(2), Fed. R. Civ. P., provides in relevant part:

> * * * any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

[6]Petitioners' reliance (Pet. 9-11) on decisions holding that permanent relief cannot be granted in proceedings in which a party has no notice that such relief will be considered is misplaced. The permanent injunctions at issue here were granted after a trial whose primary purpose was the adjudication of the Commission's request for permanent relief, and petitioners had ample notice of that purpose.

As the court of appeals noted (Pet. App. A, p. 4a, n. 4): "Appellants [petitioners] have now had their trial before Judge Weinfeld. It is no denial of due process if they chose not to present any evidence there."[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

LAWRENCE E. NERHEIM,
General Counsel,

DAVID FERBER,
Solicitor,

RICHARD E. NATHAN,
Assistant General Counsel,
Securities and Exchange Commission.

JUNE 1975.

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[7]Petitioners' suggestion (Pet. 12) that the delay between the trials on preliminary and permanent relief impaired their ability to present a defense is not supported by the record. While they imply that witnesses could not be located (*ibid.*), there is no indication that any attempt was made to call witnesses.